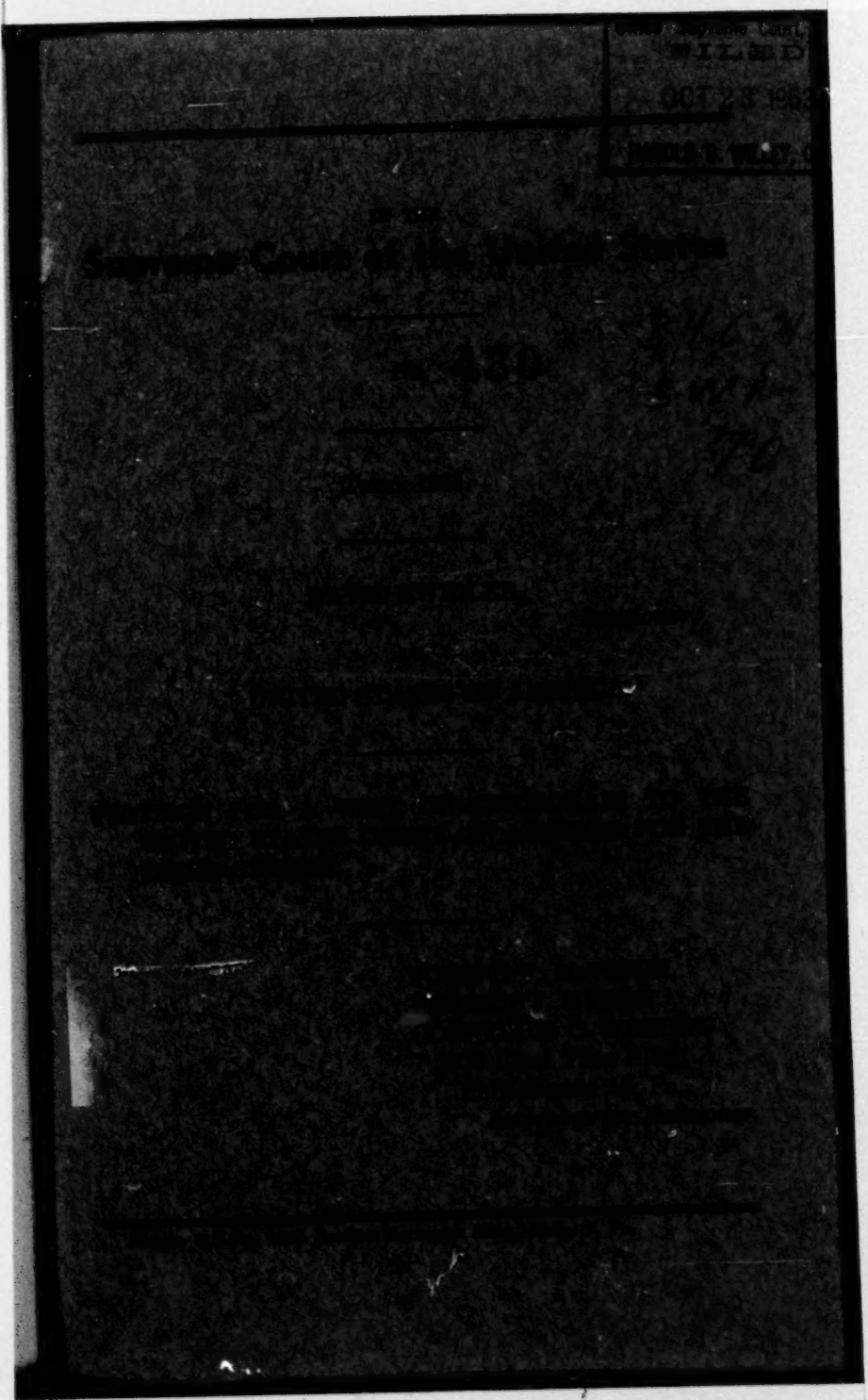
FILED
OCT 28 1963

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement 4

Reasons for Granting the Writ 6

Conclusion 14

CITATIONS

CASES:

Berman vs. United States, 302 U. S. 211 ..... 5, 11

Brock vs. North Carolina, U. S. , 97 L. Ed. (Advance p. 317) 13

Cohen vs. Beneficial Industrial Loan Corp., 337 U. S. 541 ..... 11, 12

Go-Bart Importing Co. vs. United States, 282 U. S. 344.. 11

Karn vs. United States (C. A. 9, 1946), 158 F. 2d 568 ... 13

Korematsu vs. United States, 319 U. S. 432 12

Ochoa vs. United States (C. A. 9, 1948), 167 F. 2d 341.. 7

Perlman vs. United States, 247 U. S. 7 11

Rattley vs. Irelan (C. A., D. C., 1952), 197 F. 2d 585 ... 7

Stack vs. Boyle, 342 U. S. 1 ..... 11, 12

AUG 9 1965

217316

PAGE

United States vs. Smith, 331 U. S. 469 13

Western Pacific Railroad Corp. vs. Western Pacific Railway Co., 345 U. S. 247 8

STATUTES:

28 U. S. C., Sec. 1291 ..... 3, 12

Federal Rules of Criminal Procedure:
Rule 29 ..... 3, 7
Rule 29(a) 3, 10
Rule 29(b) 4, 10
Rule 33 13

MISCELLANEOUS:

Hearing and Rehearing Cases in Banc by Hon. Albert Branson Maris, 14 F. R. D. 91 9

Rule 4(3), United States Court of Appeals for the Third Circuit 8

IN THE

SUPREME COURT OF THE UNITED STATES.

No.

Term, 1953.

DAVID SWIDLER,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

David Swidler, by his attorneys, Cornelius C. O'Brien, Francis J. Myers and Joseph F. McVeigh, prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit, entered September 25, 1953.

OPINION BELOW.

The opinion of the Court of Appeals is not reported at this time but is set forth in the Record at pp. 64a-66a.

JURISDICTION.

The Order of the Court of Appeals was entered on September 25, 1953 (R. 63a). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

Whether an order entered by a Judge of a United States District Court in a criminal case, denying a defendant's motion, under Rule 29 of the Federal Rules of Criminal Procedure, 18 U. S. C., for judgment of acquittal, following a jury's verdict of guilty, is a final decision within the meaning of 28 U. S. C., Section 1291?

Whether, where a defendant in a criminal case bases his alternative motion for a new trial on the specific ground that certain evidence was erroneously admitted, a Federal Trial Judge may order a new trial "in the interests of justice," more than six months after the verdict, and without ruling on the specific reason advanced in support of such alternative motion?

STATUTES INVOLVED.

ACT OF JUNE 25, 1948, c. 646.62 Stat. 929, 28 U.S.C. 1291.

FINAL DECISIONS OF DISTRICT COURTS.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

RULE 29, FEDERAL RULES OF CRIMINAL PROCEDURE 18 U. S. C.

MOTION FOR ACQUITTAL.

(a) MOTION FOR JUDGMENT OF ACQUTTAL. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal.

STATEMENT.

Petitioner was charged, in an indictment containing one count, with having wilfully and knowingly attempted to defeat and evade part of his income tax liability for the calendar year 1945, by having filed a false and fraudulent return (R. 2a, 3a).

The cause was tried before a District Judge of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia, and a jury from May 26 to June 3, 1952. At the close of the government's case, petitioner's motion for judgment of acquittal under Rule 29(a), FRCrim.P was denied. Petitioner offered no evidence. The jury returned a verdict of guilty on June 3, 1952. On June 5, petitioner renewed his motion for judgment of acquittal, and moved in the alternative for a new trial (R. 57a).

On December 4, 1952, the Trial Judge entered an order denying petitioner's motion for judgment of acquittal but ordered a new trial "in the interests of justice," without ruling specifically on the reason advanced in support of the

alternative motion for a new trial (R. 58a). Notice of appeal from that part of the order denying petitioner's motion for judgment of acquittal was filed on December 11, 1952. As a result of conferences between counsel for petitioner and respondent, the latter moved to dismiss the appeal on the ground that the order appealed from was not a final decision within the purview of 28 U. S. C., Section 1291 (R. 59a).

Respondent's motion to dismiss petitioner's appeal was argued on February 2, 1953. On March 9, 1953, the Court of Appeals entered an order dismissing the appeal on the ground, as stated in its opinion accompanying the order that the order appealed from was not, "at least at this stage of the proceedings," a final decision within the purview of 28 U. S. C., Section 1291 (R. 60a, 62a).

Petition for rehearing of the order dismissing petitioner's appeal was granted on April 8, 1953. The questions presented were fully briefed and argued before the Court of Appeals on June 1, 1953.

On August 17, 1953, the Court of Appeals entered an order directing that the case be set down for rehearing before the Court en banc. Reargument was had before the Court en banc on September 14, 1953.

On September 25, 1953, the Court of Appeals entered two orders, one withdrawing its prior opinion of March 9, 1953, and the other dismissing the appeal for want of jurisdiction (R. 63a).

In its opinion filed September 25, 1953, accompanying the order entered on the same day, dismissing the appeal, the Court of Appeals stated that the leading criminal case interpreting the meaning of the phrase "final decisions" is *Berman vs. United States*, 302 U. S. 211 (1937); noted that in that case it was held that "to create finality it was necessary that petitioner's conviction should be followed by sentence," and that in criminal cases a judgment is final for the purposes of appeal "when it terminates the litigation * * * on the merits" and "leaves nothing to be done but to

enforce by execution what has been determined"; and concluded that "since no judgment of sentence has been entered by the court below, a new trial having been ordered, * * * the order denying judgment of acquittal is not a final reviewable decision within the purview of Section 1291." The Court accordingly dismissed the appeal (R. 65a, 66a).

REASONS FOR GRANTING THE WRIT.

1. In holding that the denial of a defendant's motion for judgment of acquittal under Rule 29 FRCrim.P is not a final reviewable decision within the purview of 28 U. S. C., Section 1291, the Court of Appeals has decided an important, indeed a basic, question of federal law which has not been, but should be, settled by the Supreme Court.

For the purpose of deciding respondent's motion to dismiss the appeal, the Court of Appeals properly assumed that the evidence offered by respondent was insufficient to sustain the verdict of guilty, and that petitioner was entitled to a judgment of acquittal when his first motion was made at the conclusion of the evidence, and again when the motion was renewed following the jury's verdict.

Having made these assumptions, the Court of Appeals then held that the provisions of Rule 29(a) are mandatory and require the entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. The Court of Appeals nevertheless concluded that the District Court's order denying petitioner's motion for judgment of acquittal was not a final reviewable decision within the purview of 28 U. S. C., Section 1291, providing that "the courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *" (R. 65a, 66a).

It is, of course, a fundamental principle of criminal law in this country that a defendant charged with the commission of crime may not be convicted except upon competent and relevant evidence, sufficient to establish his guilt beyond a reasonable doubt, and that where there is a total lack of such evidence, a defendant must be acquitted. This cardinal concept of the process of law has been explicitly set forth in Rule 29 of the Federal Rules of Criminal Procedure. The Rules have the force and effect of law; *Ochoa vs. United States* (C. A. 9, 1948), 167 F. 2d 341; *Rattley vs. Irelan* (C. A., D. C., 1952), 197 F. 2d 585. Hence, if there is no evidence to sustain a verdict of guilt, a defendant is entitled to a judgment of acquittal, as a matter of law, and his right to such judgment is not only embodied in the constitutional guarantee of due process, but is statutory under the clear mandate of Rule 29 FRCrim.P.

As a result of the holding of the Court of Appeals that the provisions of Rule 29(a) are mandatory, its assumption that there was no evidence to sustain the verdict, and its conclusion that the denial of judgment of acquittal is not a final decision under 28 U. S. C., Section 1291, we have the anomalous situation of a defendant, entitled as a matter of law to a judgment of acquittal, being erroneously denied the judgment to which he is entitled, and having no right to appeal from the denial of his fundamental right to an acquittal.

The complete absence of any decision or authority on the question of the finality of an order denying a motion for judgment of acquittal has resulted in a case of first impression, in which the holding of the Court of Appeals, having far reaching effect on the rights of all defendants charged with crime in the federal courts, poses serious questions vitally affecting the administration of criminal justice.

2. The fundamental importance of the questions here presented is attested by the fact that these questions have been argued at length before three judges of the Court of

Appeals on two occasions, and at the direction of the Court, on its own motion, before the Court en banc, consisting of seven circuit judges.

Rule 4(3) of the Rules of the Court of Appeals for the Third Circuit provides: "Cases and controversies shall be heard and determined by a court or division of not more than three judges unless a hearing or rehearing before the Court in banc is ordered by a majority of the active circuit judges. The Court in banc shall consist of all the active circuit judges of the circuit."

In *Western Pacific Railroad Corporation vs. Western Pacific Railroad Company*, 345 U. S. 247, 73 S. Ct. 656, 97 L. Ed. 650, this Court considered in detail the procedure for convening a United States Court of Appeals in banc. Having analyzed the effect of 28 U. S. C., Section 46(c) upon the right of a litigant to a hearing before the court in banc, this Court held that a litigant had no right to be heard by the full court, but that "the Statute is simply a grant of power to order hearings and rehearings en banc and to establish the procedure governing the exercise of that power." 345 U. S. , 97 L. Ed. (Advance p. 661). This Court stated at 345 U. S. , 97 L. Ed. (Advance p. 659): "Finally, it is essential to recognize that the question of whether a cause should be heard en banc is an issue which should be considered separate and apart from the question of whether there should be a rehearing by the division. The three judges who decide an appeal may be satisfied as to the correctness of their decision. *Yet, upon reflection, after fully hearing an appeal, they may come to believe that the case is of such significance to the full court that it deserves the attention of the full court.*" (Emphasis supplied.)

In view of this Court's opinion in *Western Pacific Railroad Corporation vs. Western Pacific Railroad Company*, supra, Judge Maris, a member of the Court of Appeals for the Third Circuit, and Chairman of the Judicial Conference Committee on Revision of the Laws, deemed it timely to describe the procedure followed in the Third Circuit for

convening the Court of Appeals in banc. In an article entitled "Hearing and Rehearing Cases in Banc", 14 F. R. D. 91, Judge Maris noted that it was impossible to state the criteria which were applied in determining to convene in banc, and stated: "It would be fair to say, however, that guiding considerations include the importance and the difficulty of the problem presented (and) divergencies in the tentative views of the judges * * *", 14 F. R. D. at p. 94. Judge Maris observed that the procedure in banc is invaluable "in the occasional case where an important new principle of law * * * or the determination of a new point of procedure of widespread interest is involved and the Court is divided in opinion or regards the matter to be of such importance as to call for the more authoritative opinion of seven judges". 14 F. R. D. at p. 97. The total number of cases heard or reheard in banc during the last annual term of the Court of Appeals for the Third Circuit was only six out of the total of 239 cases heard; 14 F. R. D. at p. 92; and while only one case was heard in banc on original argument, and one after decision by a panel of three judges (14 F. R. D. at pp. 93, 94), the situation which existed in the case at bar, namely, argument before a panel of three judges, decision, rehearing granted before a panel of three judges, and *then* rehearing before the court in banc, is apparently completely novel in the Court of Appeals for the Third Circuit.

3. The Court of Appeals while recognizing the mandatory character of Rule 29(a), observed that Rule 29(b) provides that if a motion for judgment of acquittal under Rule 29(a) be denied, the motion may be renewed within five days after the jury is discharged "and may include in the alternative a motion for a new trial", and that the Court "may on such motion set aside the verdict and order a new trial or enter judgment of acquittal." (R. 65a.) The significance of Rule 29(b), in the view of the Court of Appeals, is not specifically indicated in its opinion.

If the dismissal of an appeal from the denial of a motion

for judgment of acquittal in a criminal case is predicated, even in part, on the fact that the denial, if erroneous, can be reviewed after the defendant is convicted at a second trial, such a conclusion can be justified only by holding that Rule 29(b) vests in the trial court a discretion to either grant or withhold the defendant's basic right to an acquittal which, under Rule 29(a), the trial court is compelled to grant. If this be so, the right of a defendant to a judgment of acquittal under Rule 29(a) is totally illusory. The Court of Appeals, far from holding the right illusory, expressly recognizes the mandatory nature of the provisions of Rule 29(a). Nevertheless, in dismissing the appeal, the Court of Appeals held that the order denying judgment of acquittal is not only not a final decision, but is not even a reviewable decision within the purview of 28 U. S. C., Section 1291.

Sound logic and the proper application of basic principles of law dictate the conclusion that the provisions of Rule 29(b), while providing for alternative action by the trial court, are discretionary only insofar as the granting of a new trial is concerned. With respect to the entry of judgment of acquittal, Rule 29(b) necessarily retains the mandatory character of Rule 29(a). Rule 29(b) in providing that if the motion for judgment of acquittal of Rule 29(a) is denied, the motion may be renewed, must mean that what is renewed is the mandatory motion provided for in Rule 29(a). It is precisely because the defendant's right to a judgment of acquittal under Rule 29(a) is mandatory where there is no evidence to sustain his conviction, that the denial of such a motion is a final decision within the meaning of 28 U. S. C., Section 1291. For, in denying the motion, the trial court has, insofar as it is in its power, terminated defendant's right to an acquittal based solely on the total lack of evidence to sustain a verdict of guilty. No decision with respect to the sufficiency of evidence at a trial could be accorded greater finality.

4. In dismissing petitioner's appeal, the Court of Appeals relied on the decision of this Court in *Berman vs. United*

States, 302 U. S. 211, which the Court of Appeals described as the leading criminal case interpreting the meaning of the phrase "final decisions". The Court of Appeals adverted to the statement of Mr. Chief Justice Hughes in the *Berman* case that: "To create finality it was necessary that petitioner's conviction should be followed by sentence * * *. In criminal cases as well as civil, the judgment is final for the purposes of appeal 'when it terminates the litigation * * * and "leaves nothing to be done but to enforce by execution what has been determined" '." The Court of Appeals thereupon concluded that "since no judgment of sentence has been entered by the court below * * * the order denying judgment of acquittal is not a final reviewable decision". (R. 65a, 66a.)

At the outset, it should be noted that the *Berman* case did not involve nor interpret the meaning of the phrase "final decisions" at all, but was concerned only with the meaning of the phrase "final judgments". *Berman* involved an appeal from a sentence which had been suspended, and the only question was whether the judgment on which the sentence had been imposed lost its finality by reason of the suspension of the sentence. It was held that it had not, that the sentence was the judgment and stood as a final determination of the merits of the criminal charge. The *Berman* case, therefore, was concerned with the finality of a judgment, not the finality of a decision, which is the test of appealability under the Statute. While it was held that only a sentence constitutes a final judgment in a criminal case, it is a final decision that Congress has made reviewable. While a final judgment is always a final decision, there are instances in which a final decision is not a final judgment. *Perlman vs. United States*, 247 U. S. 7, 62 L. Ed. 950; *Go-Bart Importing Co., et al. vs. U. S.*, 282 U. S. 344, 75 L. Ed. 374; *Cohen vs. Beneficial Industrial Loan Corp.*, 337 U. S. 541, 93 L. Ed. 1528; *Stack vs. Boyle*, 342 U. S. 1, 96 L. Ed. 3.

Nor is it any longer necessary, notwithstanding the hold-

ing in the *Berman* case, that a conviction be followed by sentence to create finality. *Korematsu vs. U. S.*, 319 U. S. 432, 87 L. Ed. 1497.

The test of finality for purposes of appeal is clearly not whether the judgment or order in question terminates the litigation, but rather whether it has a final and irreparable effect on the rights of a party. *Cohen vs. Beneficial Industrial Loan Corp.*, supra. Certainly, if the order denying petitioner's motion for judgment of acquittal is not final, it can result in his conviction at a second trial, and if the order is not reviewable at all, as the Court of Appeals indicates, it will have had an irreparable effect on his fundamental rights.

In *Stack vs. Boyle*, supra, Mr. Chief Justice Vinson, speaking for the Court, said: "As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable as a 'final decision' of the District Court under 28 U. S. C. (Supp. IV), Section 1291."

The true purpose of the finality requirement was stated by Mr. Justice Jackson in his separate opinion in *Stack vs. Boyle*, supra, to be "to avoid piecemeal disposition of the basic controversy in a single case 'where the result of review will be "to halt in the orderly progress of a cause and to consider incidentally a question which has happened to cross the path of the litigation" '". Applying this test to the order denying petitioner's motion for judgment of acquittal, it is evident that the purpose of the finality requirement is fully served. The basic controversy in this cause is whether petitioner is guilty or innocent of the crime with which he is charged, and more specifically, whether the evidence adduced at the trial is sufficient to sustain a conviction, for if it is not, then petitioner is entitled as a matter of law to a judgment of acquittal. A review of this basic question cannot possibly affect the orderly progress of this cause, nor will such a review be concerned with a question that incidentally happened to cross the path of the litigation. On the contrary, if the order complained of was

erroneous, the litigation is at an end. And far from halting the orderly progress of the cause, it is manifest that to require petitioner to undergo another trial, before a review of his present right to an acquittal can be had, is not only disruptive of logic and orderly procedure, but works a grave injustice upon petitioner and deprives him of due process of law. To require a new trial where the evidence, for whatever reason, is wholly insufficient to support a conviction, is an offense to fundamental fairness and due process. The scales of justice must be kept in equal balance and a defendant should not be subjected to a new trial on a charge on which he should have been acquitted merely in order to allow a prosecutor to see if he cannot do better a second time. Mr. Justice Frankfurter concurring in *Brock vs. North Carolina*, 97 L. Ed. 317, 321; Mr. Chief Justice Vinson dissenting, 97 L. Ed. 322; *Karn vs. United States* (C. A. 9, 1946), 158 F. 2d 568, 573.

5. The Court of Appeals, in dismissing petitioner's appeal, also noted that a new trial had been ordered. In its order of December 4, 1952, however, the trial court did not grant a new trial for the reason advanced by petitioner and in fact made no reference thereto. The trial court simply ordered a new trial "in the interests of justice". This order was entered more than six months after the jury's verdict of guilty which was returned on June 3, 1952. In such case the trial court was without authority to exercise on its own motion the power conferred by Rule 33 of the Federal Rules of Criminal Procedure to grant a new trial to a petitioner in a criminal case in the interests of justice, beyond the time limit fixed by the Rule for the making of a motion for a new trial, namely, five days after the verdict or finding of guilty. *United States vs. Smith*, 331 U. S. 469, 67 S. Ct. 1330, 91 L. Ed. 1610, 1614. In the *Smith* case, it is indicated that the trial court may not order a new trial on its own initiative at all, since Rule 33 provides that a court may grant a new trial to a petitioner, and does not say that the

court may order a new trial (see footnote, 91 L. Ed. 1613); and when the draftsmen of the Rules of Civil Procedure, adopted long before the Criminal Rules, wanted to give the trial judge power to grant a new trial on his own initiative, they did so in express words, Rule 59(d), Rules of Civil Procedure (see footnote, 91 L. Ed. 1615).

In any event, the trial court's discretionary power to grant a new trial under Rule 29(b) cannot detract from petitioner's absolute right to a judgment of acquittal under Rule 29 where there is no evidence to sustain a conviction, and hence cannot affect the finality of the Court's order denying petitioner's motion for judgment of acquittal.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

JOSEPH F. McVEIGH,
FRANCIS J. MYERS,
CORNELIUS C. O'BRIEN,
Attorneys for Petitioner.

October, 1953.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and rules involved	2
Statement	4
Argument	8
Conclusion	16

CITATIONS

Cases:	
Berman v. *United States*, 302 U. S. 211	12
Brock v. *North Carolina*, 344 U. S. 424	14
Bryan v. *United States*, 338 U. S. 552	10–12
Burdeau v. *McDowell*, 256 U. S. 465	15
Cobbledick v. *United States*, 309 U. S. 323	14
Cogen v. *United States*, 278 U. S. 221	15
Cohen v. *Beneficial Loan Corp.*, 337 U. S. 541	12, 14
Cone v. *West Virginia Paper Co.*, 330 U. S. 212	11
Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U. S. 837	9
Go-Bart Co. v. *United States*, 282 U. S. 344	15
Korematsu v. *United States*, 319 U. S. 432	12
Perlman v. *United States*, 247 U. S. 7	15
Roche v. *Evaporated Milk Assn.*, 319 U. S. 21	14
Stack v. *Boyle*, 342 U. S. 1	12, 14
Swift & Co. v. *Compania Caribe*, 339 U. S. 684	12, 14
United States v. *Cefaratti*, 202 F. 2d 13, certiorari denied, 345 U. S. 907	12
United States v. *Smith*, 331 U. S. 469	15
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	8
United States v. *Stone*, 308 U. S. 519, affirming *Ex parte United States*, 101 F. 2d 870	10
Statute:	
28 U. S. C. 1291	2, 12
Miscellaneous:	
Advisory Committee on the Rules of Criminal Procedure, Note to Rule 29	10
Federal Rules of Criminal Procedure:	
Rule 29	3, 8–10
Rule 33	4, 15

280601—53——1

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 430

DAVID SWIDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 60a–62a)[1] was withdrawn (R. 63a) and was not reported. The second opinion of the court sitting *en banc* (R. 64a–66a) has not yet been reported.

[1] In the Court of Appeals both petitioner and the Government filed printed appendices containing portions of the reporter's transcript of the trial proceedings. The record in this Court is composed of those two appendices. References to the appendix for petitioner will be designated, "R." References to the appendix for the Government will be designated, "A."

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1953. (R. 63a.) The petition for a writ of certiorari was filed October 23, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was denied. He rested without offering evidence and the jury returned a verdict of guilty. Petitioner then filed a motion for judgment of acquittal or, in the alternative, for a new trial. The question presented is:

Whether the court's order denying the motion for judgment of acquittal but granting a new trial is a final and appealable decision under the provisions of 28 U. S. C. 1291.

STATUTE AND RULES INVOLVED

28 U. S. C.:

> SEC. 1291. *Final decisions of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct

review may be had in the Supreme Court. * * *

FEDERAL RULES OF CRIMINAL PROCEDURE:

Rule 29. Motion for Acquittal.

(a) *Motion for Judgment of Acquittal.*

Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) *Reservation of Decision on Motion.*

If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may

on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 33. *New Trial.*

The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

STATEMENT

On March 6, 1952, an indictment was filed against petitioner in the United States District Court for the Eastern District of Pennsylvania charging him with wilfull attempted evasion of his income taxes for the calendar year 1945, in violation of Section 145 (b) of the Internal Revenue Code. The single count of the indictment alleged that petitioner had filed a fraudulent return stating that his net income was $4,601.47 and that the tax due was $765.36, whereas he knew

that the figures should have been $110,516.01 and $78,199.73. (R. 2a–3a.)

The evidence adduced by the Government may briefly be summarized as follows:

During 1945, the taxable year, petitioner supplied cash to a luggage manufacturer for the purchase of large quantities of cloth from mills. When the cloth was delivered to the luggage factory petitioner took charge of it. (A. 1a–6a.) Representing himself as a salesman for either Charles Schwartz or J. Levenson, he then sold it to various dealers at a considerable profit.[2] (R. 36a–42a; A. 12a, 15a, 21a.) Invoices to the purchasers were always in the name of Schwartz or Levenson. (R. 10a; A. 4a–22a, 26a–27a.) The checks in payment were made out to Schwartz or Levenson, but they were either handed to petitioner personally or mailed to him. (A. 10a, 12a–22a; cf. R. 8a–10a and A. 24a–25a.) When one of the purchasers asked about the identity of Schwartz or Levenson, petitioner said, "As long as you are getting the piece goods that you want and so long as it is being billed to you with a legitimate bill, what difference does it make to you?" (A. 21a–22a.) Some of the people with whom he had contacts in the course of these dealings actually knew him, not as Swidler, but as

[2] In some instances the purchasers apparently realized that they were actually buying the goods from petitioner himself. (A. 7a–8a, 17a–18a.)

either Schwartz or Levenson. (A. 6a, 11a, 22a–23a.)

The Schwartz and Levenson checks which petitioner received were always cashed at check cashing firms in New York.[3] (R. 13a–36a.) The manager of one of these firms knew petitioner as Charles Schwartz. (R. 13a–14a, 21a.) He was always accompanied by one or two other men when he came in. (R. 25a–26a, 29a.) When checks made out to Schwartz were presented, the manager counted out the money and gave it to petitioner. (R. 13a–18a, 21a, 23a–24a, 28a.) Petitioner introduced one of the other men as Levenson, and Levenson and petitioner always came in together when they had a Levenson check to cash. The manager counted out the money and gave it "to them". (R. 18a, 21a–25a, 28a–29a.)

Treating all these checks as income to petitioner (R. 36a–48a), the Government computed his true net income for 1945 to be $79,414.48 (R. 48a). His return for that year showed a net income of only $5,101.47 derived from a partnership. (R. 4a–7a, 48a, 53a–56a.)

Petitioner's motion for a judgment of acquittal at the close of the Government's evidence was overruled. (R. 52a.) The defense then rested

[3] The one check which was made out in petitioner's own name was deposited in his personal bank account. (R. 8a–10a, A. 24a–25a.)

without offering any evidence and the jury returned a verdict of guilty. (R. 1a; Pet. 4.)

After the verdict petitioner filed a timely renewal of the motion for a judgment of acquittal, asking in the alternative for a new trial under the provision of Rule 29 (b). The stated grounds for both alternatives were: (1) that the evidence was insufficient; (2) that the original motion for judgment of acquittal should have been granted; (3) that the verdict was contrary to the weight of the evidence; and (4) that it was error to admit certain checks not shown to have been paid to petitioner. (R. 57a.) The trial judge refused a judgment of acquittal, but granted a new trial in "the interests of justice". (R. 58a.) Petitioner noted a timely appeal.[4] (R. 2a.)

The Government filed a motion to docket and to dismiss the appeal on the ground that the order of the District Court was not final. (R. 59a.) The appeal was dismissed by a three-judge panel of the Court of Appeals. (R. 60a.) Thereafter the case was reargued before the full bench and was again ordered dismissed. (R. 63a.) The original opinion of the court was withdrawn and a new one filed in which the full bench concurred. Assuming *arguendo* that the evidence was insufficient to support the verdict, the court pointed out that the provisions of Rule 29 would require the trial court to enter a judgment of

[4] The notice of appeal has not been included in the record.

acquittal under such circumstances. The court held, however, that since no sentence was imposed and a new trial was granted on petitioner's motion therefor, the order of the District Court was not "a final reviewable decision within the purview of Section 1291." (R. 64a–66a.)

ARGUMENT

Petitioner contends (Pet. 6–14) that the provisions of Rule 29 (*supra*, p. 3) required the trial court to grant a judgment of acquittal if the evidence was insufficient, and that the denial of his motion was a final and appealable decision. But, as the court below unanimously held *en banc*, the order of the District Court was neither a final judgment nor a final decision. Petitioner's contention is without merit.

1. Preliminarily, it should be pointed out that the premise of petitioner's argument (and the assumption *arguendo* of the Court of Appeals)—that the grant of the new trial was based upon an insufficiency of the evidence—is inconsistent with the most logical interpretation of the District Court's order. For the District Court merely stated that "the interests of justice require that a new trial be granted," without indicating the basis for that conclusion (R. 58a). Even from the brief summary of the evidence recited above (pp. 5–6), it is apparent that there certainly was "some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S.

150, 254; *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837. Inasmuch as petitioner had assigned as one reason for his alternative motions alleged errors in admitting evidence, it is at the very least a logical inference that it was on this ground, and not upon the insufficiency of evidence, that the new trial was granted. It would thus appear that the Court of Appeals actually decided only a hypothetical question not necessarily presented by the record.

2. Basic to petitioner's entire argument—which assumes with the court below that the evidence was insufficient (but cf. *supra*)—is his contention (Pet. 7, 10, 12, 13, 14) that there is an absolute and Constitutionally guaranteed right to acquittal where there is insufficient evidence of guilt, and that this absolute right is made explicit by the provisions of Rule 29. It may be conceded that such a right accrues before verdict, but it has always been the law that the filing of a motion for a new trial after verdict of guilty operates as a waiver of the right. Prior to the adoption of Rule 29, the district courts commonly granted new trials because of insufficiency of the evidence, but they either did not have or did not in fact commonly exercise the power to enter a judgment of acquittal after verdict. Thus, a defendant, whose motions for a directed verdict were denied at the end of the Government's case and again at the close of all the evidence, was commonly thought to

have no choice after verdict except to move for a new trial.[5] Allowance of the motion effected a waiver of the accrued right to an acquittal. The lack of finality under such circumstances is so obvious that we have been able to discover no case in which an appeal was even attempted.

One of the objects of Rule 29 was to sanction the practice, followed by a few district courts but left uncertain by this Court (*Ex parte United States,* 101 F. 2d 870 (C. A. 7), affirmed by an equally divided Court, *sub nom. United States* v. *Stone,* 308 U. S. 519), of permitting a motion for judgment of acquittal after verdict as an alternative to a motion for new trial.[6] But there is nothing to indicate that the allowance of the requested new trial should no longer operate as a waiver of the allegedly accrued right to acquittal. In ultimate analysis, peti-

[5] See Brief for the United States in *Bryan* v. *United States,* No. 178, October Term, 1949, pp. 18, 20–21, 37–39.

[6] The Advisory Committee on the Rules appended the following notes to Rule 29:

"*Note to Subdivision* (*a*). 1. The purpose of changing the name of a motion for a directed verdict to a motion for judgment of acquittal is to make the nomenclature accord with the realities. The change of nomenclature, however, does not modify the nature of the motion or enlarge the scope of matters that may be considered.

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"*Note to Subdivision* (*b*). This rule is in substance similar to Rule 50 (b) of the Federal Rules of Civil Procedure, following 28 U. S. C. § 723c, and permits the court to render judgment for the defendant notwithstanding a verdict of guilty. Some Federal courts have recognized and approved the use of a judgment non obstante veredicto for the defend-

tioner's argument seems to boil down to a contention that he cannot twice be placed in jeopardy for the same offense.[1] But it is settled that petitioner waived this right by requesting and obtaining a new trial. *Bryan* v. *United States*, 338 U. S. 552, 560.

In the *Bryan* case, there was a similar alternative motion for judgment of acquittal and for a new trial. The motion was denied and sentence was imposed. The Court of Appeals for the Fifth Circuit reversed for insufficiency of the evidence, but it ordered a new trial instead of directing a judgment of acquittal. Bryan petitioned for a writ of certiorari on the ground that Rule 29 entitled him to a judgment of acquittal. This Court granted certiorari and affirmed the judgment of the Court of Appeals. Although not squarely controlling here, since this Court held that Rule 29 does not apply to appellate courts, the case is persuasive in that, though the evidence was insufficient, a new trial was ordered instead of an acquittal, largely because Bryan's motion

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ant in a criminal case. *Ex parte United States*, 101 F. 2d 870, C. C. A. 7th, affirmed by an equally divided court, *United States* v. *Stone*, 60 S. Ct. 177, 308 U. S. 519, 84 L. Ed. 441. The rule sanctions this practice."

When such an alternative motion is made after verdict in a civil case, it is clear that the district court may in its discretion choose either alternative. *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 215.

[1] The due process argument, *i. e.*, that petitioner cannot be convicted except upon sufficient evidence, is of no avail since the conviction has been set aside.

in the District Court had requested one or the other of these remedies in the alternative.[8] 338 U. S. at 558–560.

3. The order denying a judgment of acquittal and granting a new trial was not a final judgment. It did not result in institution of disciplinary measures and was not a determination of guilt. *Korematsu* v. *United States,* 319 U. S. 432, 435; *Berman* v. *United States,* 302 U. S. 211, 212–213. But petitioner insists that the order was a final "decision" within the meaning of 28 U. S. C. 1291 (*supra,* p. 2), relying on such cases as *Stack* v. *Boyle,* 342 U. S. 1, 6, 12, and *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545, 547. See also *Swift & Co.* v. *Compania Caribe,* 339 U. S. 684, 688–689. Perhaps the best analysis of this line of cases is that of the Court of Appeals for the District of Columbia Circuit:[9]

> We understand the Cohen and Swift cases to establish this principle. An order that does not "terminate an action" but is, on the contrary, made in the course of an action, has the finality that Section 1291 requires for appeal if (1) it has "a final and irreparable effect on the rights of the

[8] The opinion of the Court touches only obliquely on the duty of a trial court when faced with such an alternative motion after verdict. 338 U. S. at 559. But the opinion of the concurring Justices clearly indicates that, in their view, the district court may order a new trial under Rule 29 when the evidence is insufficient to support the verdict.

[9] *United States* v. *Cefaratti,* 202 F. 2d 13, 16, certiorari denied, 345 U. S. 907.

> parties," being "a final disposition of a claimed right"; (2) it is "too important to be denied review"; and (3) the claimed right "is not an ingredient of the cause of action and does not require consideration with it." * * *

Measured by this test, the order of the District Court is clearly not a final and appealable decision.

(a) The order of the District Court has no final effect on the rights of the parties and is not a final disposition of petitioner's right to a judgment of acquittal on the pending charge. That remedy remains open to him after the presentation of the evidence at the new trial. Had petitioner been content to file only a motion for judgment of acquittal, the denial of that motion would have been followed by imposition of sentence and a final judgment. But petitioner requested *either* a judgment of acquittal *or* a new trial on the ground that the evidence was insufficient, and he cannot now complain that his right to a judgment of acquittal has been finally determined when, at his own request, the entire trial proceedings have been set aside. See *supra*, pp. 9–12. Nothing has been determined contrary to petitioner except that he is not entitled to an acquittal at the present time.

(b) The order is not "too important to be denied review." True, it will, as petitioner contends (Pet. 13), subject him to the inconvenience of an-

other trial. But this is the necessary result of the Congressional policy against piecemeal appeals. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30–31; *Cobbledick* v. *United States*, 309 U. S. 323. If petitioner's argument were carried to its logical conclusion, and, indeed, the petition appears to make this very contention (Pet. 10), the denial of a motion for a judgment of acquittal at the close of the Government's case would be a final decision, and the trial would be interrupted by an appeal as of right at that point.[10]

(c) Petitioner's claimed right to a judgment of acquittal is not separable from the main action. On the contrary, it goes to the very heart of the cause of action. The case is, therefore, clearly distinguishable from the *Cohen, Swift* and *Stack* cases, *supra,* which involved separable and auxiliary proceedings such as attachments and applications for bail. The decisions appealed from there had a final effect upon the rights of the parties which could not be remedied by an appeal in the main action.[11] Here, however, petitioner will still be able to obtain a judgment of acquittal if the Gov-

[10] Petitioner's reference to *Brock* v. *North Carolina*, 344 U. S. 424, is not in point. Brock was objecting to a second trial after the prosecutor had requested and obtained a mistrial in the original proceedings. Furthermore, this Court held that under the circumstances the interests of justice were served by ordering a new trial.

[11] Cases involving appeals from orders denying or granting motions to suppress evidence *prior to indictment* are likewise inapposite. There also the order appealed from is sep-

ernment fails to present substantial proof of the essentials of the charge at the next trial.

4. Petitioner also contends (Pet. 13–14) that the grant of a new trial was improper, and that the denial of the judgment of acquittal must, therefore, be final. The argument is that the District Court acted on its own initiative and not on petitioner's motion, since it granted the new trial "in the interests of justice" instead of for any one of the reasons specified in the motion; and that it was without power to act on its own initiative since more than five days had elapsed after the return of the verdict. The argument is plainly without merit. The trial court was clearly acting on petitioner's motion. "The first sentence of this rule[12] is declaratory of the power to grant a new trial 'in the interest of justice' instead of for reasons catalogued as they might have been. The generality of the reasons assigned by [the trial judge] for the order in question is all that is required." *United States* v. *Smith*, 331 U. S. 469, 472.

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arable from the main action. See *Perlman* v. *United States*, 247 U. S. 7; *Burdeau* v. *McDowell*, 256 U. S. 465; *Go-Bart Co.* v. *United States*, 282 U. S. 344; and cf. *Cogen* v. *United States*, 278 U. S. 221.

[12] Rule 33, *supra*, p. 4. An immaterial footnote has been omitted from this quotation.

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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